

1 Traeger Machetanz, Esq.
2 Thomas R. Krider, Esq.
3 OLES MORRISON RINKER & BAKER, LLP
4 745 Fourth Avenue, Suite 502
5 Anchorage, AK 99501-2136
6 Telephone: (907) 258-0106
7 Telecopier: (907) 258-5519

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Attorneys for Nugget Construction Co., Inc.,
and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
Handling, on its own behalf,)

No. A98-009 CIV (TMB)

Plaintiffs,)
and)
)

UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
d/b/a Marathon Fuel Service, and)
SHORESIDE PETROLEUM, INC., d/b/a)
Marathon Fuel Service, on its own)
behalf,)

NUGGET'S RESPONSE TO THE
COURT'S JANUARY 5, 2007
ORDER ON COUNSEL'S MOTION
TO WITHDRAW

Intervening Plaintiffs,)
and)
)

METCO, INC.,)

Intervening Plaintiff,)

vs.)

NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

Defendants.)

1 Pursuant to the Court's January 5, 2007 Order on Motion to
 2 Withdraw as Counsel of Record, Nugget provides herein additional
 3 briefing relating to the questions posed by the Court in its Order.

4 As an initial matter, Nugget does not take a position with regard
 5 to whether the Herrig, Vogt & Stoll, LLP firm can be required to
 6 continue representing Spencer Rock Products ("SRP") after having been
 7 discharged by its client, nor does Nugget take a position on whether
 8 the Herrig, Vogt & Stoll, LLP firm can withdraw absent appointment of
 9 substitute counsel. Because the legal and ethical considerations
 10 involved with these questions do not affect Nugget, Nugget believes it
 11 is best to allow those parties with a stake in the answers to advise
 12 the Court on these issues. Nugget will, however, address the two
 13 questions concerning the possible default of SRP.

14 **I. ARGUMENT**

15 **A. If SRP Is No Longer A Viable Entity, It Should Cease Its
 16 Participation In This Proceeding.**

17 There has never been any question that the Plaintiffs are
 18 entitled to payment from SRP of the contract sums due and owing. The
 19 work they performed was under an express contract each of them had
 20 with SRP. It is also undisputed that SRP failed to pay Plaintiffs for
 21 any of the work for which it contracted. The only reason Nugget and
 22 USF&G are involved in this litigation, and the only reason Plaintiffs
 23 have spent ten years pursuing them, is because Plaintiffs apparently
 24 do not believe SRP has the ability to make good on its debts.

1 Otherwise, Plaintiffs could have readily obtained summary judgment
2 against SRP and begun collection proceedings.

3 With regard to the withdrawal of the Herrig, Vogt & Stoll LLP
4 firm, the Court is correct that SRP has only two choices: (1) it must
5 appoint substitute counsel such that it continues to be represented by
6 a licensed attorney in this matter, or (2) it must give up its
7 defenses and allow a default to be taken against it. Based on Mr.
8 LaPore's affidavit in support of the Motion to Withdraw, it does not
9 appear that SRP has the resources to continue its defense, and
10 therefore, it should either strike its Answer and allow a default to
11 be taken, or allow the Court to impose default as a sanction for
12 failure to appoint counsel.

13 If SRP is truly no longer a viable company, then there is no harm
14 to it or Mr. LaPore from a default being entered. Upon entry of the
15 default, the Plaintiffs would be allowed to pursue collection against
16 any remaining SRP assets. Assuming that there are no remaining
17 assets, nothing changes for Mr. LaPore. However, if there are assets,
18 then Plaintiffs' claims in this matter would be reduced by whatever is
19 collected. Plaintiffs, Nugget and USF&G have every right to know
20 whether there are funds to satisfy some or all of SRP's debts.

21 **B. A Default Against SRP Does Not Affect The Remainder Of The**
22 **Litigation.**

23 Presumably because of Plaintiffs' collective beliefs that SRP is
24 without assets, there has been only minimal participation of SRP in

1 these proceedings.¹ This is also the case with regard to Mr. LaPore
 2 himself - there has been very little activity regarding Plaintiffs'
 3 claims against him. In truth, absent Mr. LaPore's personal guarantee
 4 on the credit extended to him by North Star as part of SRP's contract
 5 with North Star, it is highly unlikely that either Mr. LaPore or SRP
 6 would have been named in this suit. It probably also explains why SRP
 7 provided any defense in the first place. Because of Mr. LaPore's
 8 personal guarantee, it is expected that he will participate in the
 9 trial *pro se* as the Court has already ordered to help deflect
 10 responsibility from himself. Thus, the absence of SRP at trial does
 11 not diminish Plaintiffs ability to present evidence involving SRP, as
 12 Mr. LaPore, for all intents and purposes, is SRP. In truth, North
 13 Star's zealous demands that SRP's counsel remain in this case appear
 14 to really be aimed at forcing the participation of a witness at trial
 15 - Mr. LaPore.

16 In addition, North Star's objection to the withdrawal of SRP's
 17 counsel and the likely default of SRP appears to be based on the
 18 notion that North Star can force SRP to defend itself, whether it
 19 wants to or not. There is nothing in the law that requires SRP, a
 20 defunct entity, to raise a defense to Plaintiffs claims if it chooses
 21 not to incur the expense of doing so. The difference in this case
 22 from nearly all of those cited in the parties' briefings is that SRP
 23 actually no longer appears to want to defend itself. Even if the
 24 Court were to deny the present Motion to Withdraw, there is nothing to
 25 prevent SRP from seeking leave to strike its Answer. More

24 ¹ It should also be noted that no cross-complaint currently exists between
 25 Nugget and SRP in this matter because SRP settled Nugget's claims against it
 in a suit brought in State Court.

24 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
 25 Case No. A98-009 CIV (TMB)
 Response to Court's Order on
 Motion to Withdraw -- Page 3 of 5

1 importantly, why is it Mr. Stoll's burden to fund the defense of his
 2 former client just to assist Plaintiffs in proving their cases against
 3 the other defendants? The notion that Plaintiffs do not wish to
 4 obtain a judgment against one of the defendants is simply absurd. It
 just demonstrates how perverse this case has become.

5 As stated above, SRP has essentially no contractual defenses
 6 against Plaintiffs' claims, so a judgment being entered against it
 7 now, as opposed to after trial, would only save time and money with
 8 regard to having to establish SRP's liability to Plaintiffs.²

9 For the reasons set forth above, Nugget does not believe that
 10 entry of a default against SRP has any negative affect on the case,
 and in fact, eliminating SRP may streamline the proceedings.

12 Dated: January 16, 2007 OLES MORRISON RINKER & BAKER LLP
 13 Attorneys for Nugget Construction,
 Inc.,

14
 15 By: s/Thomas R. Krider
 Thomas R. Krider
krider@oles.com
 Washington Bar No. 29490
 745 West 4th Avenue, Suite 502
 Anchorage, AK 99501
 Phone: (907) 258-0106
 Fax: (907) 258-5519

22
 23 ² Entry of a default judgment against SRP also has no *res judicata* or
 collateral estoppel affect against either Nugget or USF&G, as Plaintiffs'
 claims against SRP will not have been decided on their merits. *Briggs v.*
State, Dept. of Public Safety, Div. of Motor Vehicles, 732 P.2d 1078, 1081-82
 (1987).

24
 25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
 Case No. A98-009 CIV (TMB)
 Response to Court's Order on
 Motion to Withdraw -- Page 4 of 5

